Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-919

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Petitioner,

—against—

THE COMMODITY FUTURES TRADING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER BRITISH AMERICAN COMMODITY OPTIONS CORP.

Set forth below is the Reply Brief of Petitioner, British American Commodity Options Corp. ("British American") in support of its prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 3, 1977.

The Respondents, Commodity Futures Trading Commission ("CFTC"), do not dispute a number of material facts as set forth in British American's Petition herein, which British American would have presented in the District Court had it had the opportunity of a hearing. It is submitted these facts would have amply supported the District Court's exercise of discretion in denying the issuance of a preliminary injunction.

At the time British American commenced business
tober 1975 the CFTC had taken no steps to regulate
odity option dealers such as British American except
ne promulgation of an anti-fraud rule.

At the time British American commenced business in
er 1975 the CFTC had not determined whether it had
liction and if so the extent of its jurisdiction over
odity option dealers or whether or not to ban or regu-
such industry.

After British American commenced business the
C for the first time announced it was considering
for the regulation of commodity options and re-
ed comments from the public (40 Fed. Reg. 49360
)). The first indication that commodity option deal-
ight be required to register as commodity trading ad-
s is contained in a footnote to such request for com-
s. Under 7 U.S.C. §6c(b) it is clear that Congress
lly intended that London commodity option dealers
emed a completely separate category than other per-
or firms subject to the CFTC's jurisdiction.

The CFTC staff was aware of British American's
nce from inception and made numerous visits to its
ses to review its marketing literature, back office
etc. While the CFTC at no time asserted that it had
liction, such information was supplied by British
ican on a purely voluntary basis.

On January 21, 1976, the CFTC published its first
ations with respect to commodity trading advisors,
ive February 20, 1976 (41 Fed. Reg. 3191).

On February 20, 1976 the CFTC published proposed
which would, if adopted, require commodity option
s to register as "commodity option dealers" (41
Reg. 7774).

7. British American was one of the first commodity option dealers to apply for registration as a commodity trading advisor.

It is submitted that had British American been given the opportunity to present its case, which was wrongfully denied to it by the Circuit Court mandate, the District Court could and should have found that British American had commenced operations and had a going business prior to the first hint of any registration requirement.[1] Such a finding by the District Court would have provided ample support for the exercise of its discretion to deny the injunction requested by the CFTC.

Furthermore, the cases cited by the CFTC do not support its companion propositions that British American was not entitled to a hearing and that the Circuit Court did not preclude an exercise of discretion by the District Court. In each of the cases cited there either was a full hearing or equivalent, or a hearing was waived. In none of the cases cited was a party such as British American denied its right to present its case in a proceeding for a preliminary injunction.

The unconstitutionality of 7 U.S.C. §12a(2) it is submitted lies in the fact that as interpreted by the Circuit

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[1] Since the definition of "commodity trading advisor" is clearly patterned after §202(a)(ii) of the Investment Advisors Act of 1940, as amended, absent clarifying regulations it could reasonably be assumed brokers such as British American were not intended to be covered as the "commodity trading advice" was only incidental to its activities as a commodity options broker. The District Court at footnote 3 held that the issue of whether or not British American was a commodity trading advisor was to be determined in the administrative proceeding. See *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 82 S. Ct. 1237, 8 L. Ed. 2d 418 (1962); *Pan American World Airways* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963) and *Federal Power Commission* v. *Louisiana Light & Power*, 402 U.S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369 (1972).

its the CFTC without limitation to force a
as British American, which was lawfully
ongoing business prior to the incidence of a
heme, out of business without a hearing
ging "other good cause" in an administrative
declining to act on its application for reg-

apologia that the almost 2 years between
he administrative complaint against British
the CFTC order denying it registration
e exercise of its statutory responsibility is
by the record, is without legal foundation
ble in view of the District Court's finding in
hat "[w]hile the CFTC's failure to hold a
is not a violation of the Commodities Ex-
may in some instances be violative of consti-
rocess". (Pet. App. 22a) Furthermore, the
found that it was "regrettable that Congress
specific time limitations on the Commission's
proceedings and equally regrettable the
as failed to act with more dispatch in this
neously held there was no justification for a
o "remedy this unfortunate situation" (Pet.
nery, what then is the function of the federal
nistrative law?

ve proceeding instituted by British American ref-
CFTC (Resp. 11) *British American Commodity*
Bagley, S.D.N.Y. 76 Civ. 1984, did not seek to
nistrative hearing but the improper contacting of
n's customers using lists obtained by the CFTC
enses and using improper investigative techniques
mes, addresses and entrapment. At no time did
n bring any proceeding to enjoin or delay the
earing relating to its commodity trading advisor
if permitted, would have shown at the eviden-
at all delays were requested by the staff of the
respondents' objections to such delays, while the
pting to obtain evidence to support its allegations,
ssful.

WHEREFORE, the undersigned on behalf of the petitioner, respectfully requests that certiorari be granted.

Respectfully submitted,

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